IN THE

MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
	)	
vs.	)	**No. SC84515**
	)	
	)	
DEANDRA M. BUCHANAN,	)	
	)	
Appellant.	)	

Appeal to the MISSOURI SUPREME COURT

From the Circuit Court of BOONE, COUNTY

Thirteenth Judicial Circuit, the Honorable Gene Hamilton, JUDGE

APPELLANT'S REPLY BRIEF

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Jurisdiction

Deandra incorporates the statement of Jurisdiction that appears at page 12 of Appellant's Opening Brief.

Facts

Deandra incorporates the statement of Facts that appears at pages 13 through 22 of Appellant's Opening Brief.

Points Relied On

I. Unconstitutional Jury Selection Procedure

The trial court erred in overruling Deandra's repeated objections that Henry County's jury selection procedure systematically excludes the blind and disabled, resulting in a jury that did not represent a fair cross-section of the community and violating due process, equal protection, and the prohibition against cruel and unusual punishment. U.S. Const., Amends. V, VI, VIII, XIV; Mo. Const., Art. I, §§ 2, 10, 18(a), 21. Henry County obtains DOR's list of licensed drivers over age 20 and uses it, alone, as the County's master list of jurors. This procedure systematically excludes blind and disabled individuals whose condition prohibits them from obtaining a driver's license. Presiding Judge Roberts agreed that this group of individuals is not legally disqualified, they simply are "not selected" for Henry County jury service.

People v. Guzman, 478 N.Y.S.2d 455 (N.Y. Sup. 1984);

United States v. Raszkiewicz, 169 F.3d 459 (7th Cir. 1999);

State v. Spivey, 700 S.W.2d 812 (Mo.banc 1985);

State v. Bynum, 680 S.W.2d 156 (Mo.banc 1984);

U.S. Const., Amends. V, VI, VIII, XIV;

Mo. Const., Art. I, §§ 2, 10, 18(a), 21;

§§ 302.110, 302.173, 302.175, 494.442;

42 USC 12132;

"The Long and Sorry History of Discrimination Against People with Disabilities in the United States – and its likely causes," *The Ragged Edge* OnLine, (Sept/Oct 2000), http://www.ragged-edge-mag.com/garrett/courtaccess.htm;

See "The Long and Sorry History of Discrimination Against People with Disabilities in the United States – and its likely causes," *The Ragged Edge* OnLine, (Sept/Oct 2000), http://www.ragged-edge-mag.com/garrett/causes.htm;

Kenneth Jernigan, "Blindness: Is the Public Against Us," Address at National Federation of the Blind Convention (Chicago, July 3, 1975), available online at http://www.nfb.org/convent/banque75.htm;

Lori Johnston, "High Unemployment Rate among Blind Blamed on Discrimination," Athens EcoLatino, (July 3, 1999), http://www.onlineathens.com/stories/070399/new_0703990013.shtml.

II. Jury Selection – Substantial Noncompliance

The trial court erred in overruling Deandra's objections to Henry County's jury selection procedure because the County does not substantially comply with §§494.400-.505, resulting in a jury that does not represent a fair cross-section and violates Deandra's rights to equal protection, due process and freedom from cruel and unusual punishment under U.S. Const., Amends. V, VI, VIII, XIV and Mo. Const., Art. I, §§ 2, 10, 18(a), 21. Henry County's procedure substantially deviates from the statutory mandate:

- **§494.410: Henry County, which has 15,988 residents over age 20, consults DOR's list of 20,009 licensed drivers. Rather than selecting 5% from DOR's list to compile its Master List, Henry County calls DOR's entire list, which contains 25% more people than Henry County has residents, its Master List.**
- **§494.415: Ignoring the statutory mandate to sanitize the Master List, Henry County never deletes disqualified jurors from DOR's list, but only deletes them from a list of 500 names randomly drawn from DOR's list.**
- **§494.430: Henry County randomly selects 500 names from DOR's list and sends each person a juror qualification form. Judge Roberts lets clerks use "their sound judgment" to excuse obviously sick or injured jurors. Clerks also excuse jurors they know to be on vacation.**

These systemic deviations from the statutory mandate do not yield a fair cross section of Henry County since they exclude all "blind and disabled" persons. These violations prejudiced Deandra in that they skew the population of potential jurors

such that, here, nearly four out of five people drawn from the Master List provided by DOR proved to be unqualified to sit as jurors in Henry County.

State v. Gresham, 637 S.W.2d 20 (Mo.banc 1982);

State v. Bynum, 680 S.W.2d 156 (Mo.banc 1984);

State v. Albrecht, 817 S.W.2d 619 (Mo.App., S.D. 1991);

U.S. Const., Amends. V, VI, VIII, XIV;

Mo. Const., Art. I, §§ 2, 10, 18(a), 21;

§494.410;

Warren, "Samples and Populations at page 12," Sociology 220, University of Washington-Seattle (May 16, 2002), available online at http://www.soc.washington.edu/users/jrwarren/soc220/Week7-2.pdf;

Ken White's Coin Flipping Page, available at http://shazam.econ.ubc.ca/flip/.

III. Stacking the Deck: Striking Juror Tucker

The trial court abused its discretion in overruling Deandra's objection and striking Juror Tucker for cause because that ruling deprived Deandra of his rights to due process, a fair and impartial jury and to be free from cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII and XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. The State agreed that it had been "[e]stablished" that Juror Tucker believed that the death penalty is appropriate in some cases. Juror Tucker unequivocally stated that she could consider and recommend the death penalty and that she would follow the court's instructions. She simply did not want to serve as foreperson and sign the verdict. Since there is no legal requirement that any juror accept the role of foreperson, Juror Tucker's desire not to be foreperson did not prevent or substantially impair her from abiding by her oath and the court's instructions.

State v. Kreutzer, 928 S.W.2d 854 (Mo.banc 1996);

Alderman v. Austin, 663 F.2d 558 (5th Cir. 1981);

Wainwright v. Witt, 469 U.S. 412 (1985);

Gray v. Mississippi, 481 U.S. 648 (1987);

U.S. Const., Amends. V, VI, VIII and XIV;

Mo. Const., Art. I, §§ 10, 18(a) and 21.

IV.

Given the court reporter's correction of page 790 of the trial transcript, Appellant has abandoned this Point Relied On.

VIII. *Ring v. Arizona*: Sentenced by Court

The trial court erred in sentencing Deandra to death because adhering to the dictates of §565.030.4(4) violated Deandra's rights to due process and a jury trial and subjected him to cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII and XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. First-degree murder is punished by imprisonment for life without parole *unless* a jury finds all essential facts necessary to impose death, i.e., that (a) at least one statutory aggravator exists for each murder, (b) the "facts and circumstances in aggravation…, taken as a whole" warrant death, and (c) the "facts and circumstances in mitigation" do not outweigh the "facts and circumstances in aggravation." Deandra's jury could not decide punishment, and rather than polling the jury to determine whether it had made these three factual findings, the trial court, pursuant to §565.030.4(4), began the deliberative process anew, made the three essential factual findings, *sua sponte*, and sentenced Deandra to death. Since this sentencing procedure is unconstitutional, §565.040.2 requires this Court to order Deandra be sentenced to life without parole.

Gregg v. Georgia, 428 U.S. 153 (1976);

Ring v. Arizona, 536 U.S. 584 (2002);

Woldt v. Colorado, 64 P.3d 256 (Colo. 2003);

Johnson v. State, 59 P.3d 450 (Nev. 2002);

U.S. Const., Amends. V, VI, VIII and XIV;

Mo. Const., Art. I, §§ 10, 18(a) and 21;

§§565.030, 565.040;

MAI-CR3d 313.40, 313.41A, 313.44A, 313.46A.

Argument

I. Unconstitutional Jury Selection Procedure

The trial court erred in overruling Deandra's repeated objections that Henry County's jury selection procedure systematically excludes the blind and disabled, resulting in a jury that did not represent a fair cross-section of the community and violating due process, equal protection, and the prohibition against cruel and unusual punishment. U.S. Const., Amends. V, VI, VIII, XIV; Mo. Const., Art. I, §§ 2, 10, 18(a), 21. Henry County obtains DOR's list of licensed drivers over age 20 and uses it, alone, as the County's master list of jurors. This procedure systematically excludes blind and disabled individuals whose condition prohibits them from obtaining a driver's license. Presiding Judge Roberts agreed that this group of individuals is not legally disqualified, they simply are "not selected" for Henry County jury service.

The State did not seize the opportunity to address Deandra's constitutional objection to Henry County's jury selection procedure. Instead of accepting responsibility for that failure, the State protests that Deandra did not raise this constitutional claim at trial (Resp.Br. 22-23). Trial counsel raised this constitutional objection three times before voir dire:

- ✓ **On March 1, 2002**, in their "Motion Challenging Henry County's Jury Selection Procedure" (Supp.L.F. 1, 2, 5, 6):

- "Said procedures…would deny Mr. Buchanan's rights to equal protection, due process, a properly-selected, representative jury constituting a fair cross-section of the community, and freedom from cruel and unusual punishment under U.S. Const., Amends. V, VI, VIII, XIV and Mo.Const., Art. I, §§ 2, 10, 18(a), 21" (Supp.L.F. 1);
- "The Sixth and Fourteenth Amendments require that juries be selected from venires that represent a fair cross-section of the community" (Supp.L.F. 1);
- "That fair cross-section right is essential to fulfill the Sixth Amendment's guarantee of an impartial jury in criminal trials" (Supp.L.F. 2, *citing* *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975);
- "The Sixth Amendment right to a jury trial and the importance that the criminal justice system be and appear fair demonstrate that 'creating a jury pool that represents a fair cross-section of the community is a compelling governmental interest" (Supp.L.F. 5, *citing* *United States v. Ovalle*, 136 F.3d 1092, 1096 (6th Cir. 1998)); and
- "Mr. Buchanan respectfully requests that this Honorable Court reject Henry County's jury selection procedures in violation, among the federal and state constitutional violations cited *supra*, of Mr. Buchanan's Sixth Amendment guarantee of an impartial jury in criminal trials" (Supp.L.F. 6).

- ✓ **On March 6, 2002**, presenting evidence on this issue at the evidentiary hearing:
  - Did not consider the fact that using only driver's licenses would exclude persons with disabilities that prohibited them from driving (Tr. 377);
  - Persons with disabilities that prohibit them from driving are eligible for jury service in Henry County, they just are not selected (Tr. 377);
  - Blind and vision impaired individuals are excluded from jury service (Tr. 378).
- ✓ **On March 6, 2002**, arguing the above motion (Tr. 393, 396):
  - "[T]he system that's set up legally prohibits qualified jurors, some of them in constitutionally protected classes, from being jurors" (Tr. 393);
  - "[N]ot getting a fair cross-section of the jury – of the community" (Tr. 396);
  - "[Y]ou're not meeting the requirements of the statute and the requirements of the 5th, 6th, 8th, 14th Amendments to the United States Constitution, and Article I, §§ 2, 10, 18(a) and 21 of the Missouri Constitution" (Tr. 396).
- ✓ **On March 11, 2002**, renewing this issue before voir dire (Tr. 1209):
  - "I would like to renew our Motion to Quash the Jury on the Selection Process based on that we feel it violates the constitutional

> provisions of due process, equal protection, and the prohibition against cruel and unusual punishment, that the selection process doesn't provide a fair cross-section" (Tr. 1209).

This constitutional objection is preserved. The State's effort to contort the preservation rules into a game of legal gotcha cannot be condoned. *Schneider v. Delo*, 85 F.3d 335, 339 (8th Cir. 1996). This issue was fairly raised, presented and argued to the trial court. *See State v. Bynum*, 680 S.W.2d 156, 160 (Mo.banc 1984) (This Court reviewed three objections to the jury selection procedures that were developed during the pretrial hearing, though the motion only raised one of those objections.).

The State supplements its preservation complaint by erecting a straw man in the form of the list of the 20,009 names received Henry County received from the Department of Revenue. The State ponders that DOR's list may have included blind and disabled persons since they can obtain "nondriver's licenses" (Resp.Br. 22). This straw man cannot stand. Henry County received this list of 20,009 names from DOR pursuant to §494.442, which requires DOR to provide boards of jury commissioners with the list that §302.110 requires DOR to maintain. Section 302.110 requires that the director "shall keep a list of ***all persons who have been licensed to drive a motor vehicle***…" (emphasis added). There is absolutely no basis for the State's hypothesis that this list somehow includes persons who cannot obtain a license to drive a motor vehicle. This list DOR provided to Henry County contained only licensed drivers. Persons who are legally blind cannot obtain a license to operate a motor vehicle. §302.175. Neither can persons with physical impairments that interfere with their ability to drive safely. §302.173.

The only real question is whether blind and disabled persons comprise a distinct group within Henry County. Respondent claims that this group is not distinctive and that its members can be legitimately removed from the jury pool (Resp.Br.24-27). Pointing to the Ninth Circuit, Respondent explains that a distinctive group is one that (1) is defined or limited by an objective factor; (2) has a common thread or similarity of ideas or experiences; and (3) has a community of interests that cannot be adequately represented on a jury if the group is excluded from jury service (Resp.Br. 25, *citing* *United States v. Fletcher*, 965 F.2d 781, 782 (9th Cir. 1992)) (additional citations omitted).

Before addressing these factors, it is necessary to correct the State's "categories of persons that have been found not to be distinctive groups" (Resp.Br. 26). First, according to the State, "poor persons" are not a distinct group (Resp.Br. 26, n.7, *citing* *State v. Wooten*, 972 P.2d 993, 998 (Az.App., Div.1, Dept.A 1998)). *Wooten* simply does not stand for this proposition. Indeed, it couldn't since the United States Supreme Court held otherwise in *Thiel v. Southern Pacific*, 328 U.S. 217, 224-225 (1946). All that the *Wooten* Court held was that those seeking to be excused from jury service due to an economic hardship did not comprise a distinctive group and that "Wooten's contention that those likely to claim hardship are disproportionately poor or racial minorities is purely speculative." 972 P.2d at 998.

Next, the State cites *People v. Fauber*, 831 P.2d 249 (Calif. 1992) for the blanket proposition that "persons who are hearing-impaired" do not comprise a distinctive group (Resp.Br. 29, n. 10). *Fauber*, *supra* at 260, noted that five venirepersons who identified themselves as hearing-impaired were not excused. The Court concluded that hearing-impaired

persons had not been systematically excluded from jury service, not that they are not a distinctive group. *Id.* Respondent reads *Fauber* far too broadly. Indeed, deaf and hearing-impaired persons do comprise a distinctive group. *People v. Guzman*, 478 N.Y.S.2d 455, 463 (N.Y. Sup. 1984). Deaf persons have served on juries in at least nine states. *Id.* at 461, n.21.

The Ragged Edge recently pointed to *State v. Spivey*, 700 S.W.2d 812 (Mo.banc 1985) as a prime example of the discrimination that persons with disabilities must endure. "The Long and Sorry History of Discrimination Against People with Disabilities in the United States – and its likely causes," *The Ragged Edge* OnLine, (Sept/Oct 2000), http://www.ragged-edge-mag.com/garrett/courtaccess.htm. The *Spivey* Court "sympathize[d] with the desire of deaf persons to participate," but concluded that including deaf jurors is not a constitutional requirement. 700 S.W.2d 814-815.[2] In reaching this conclusion, the *Spivey* Court opined that the "cross section requirements are applied less strictly when manifest convenience, or the public interest, shows reason for deviation." *Id.* *Spivey*, however, predates the American with Disabilities Act, which flatly prohibits such exclusion of persons with disabilities as a matter of convenience. 42 USC 12132. Further, *Spivey* merely addressed whether the statutory requirement that jurors be able to read, write and understand English unconstitutionally excluded profoundly deaf individuals. It did not consider whether a County can constitutionally exclude all persons with a profound hearing impairment from the opportunity to serve on

[2] This was the first appellant had seen of *Spivey*. Respondent did not cite *Spivey* either.

a jury. The former addresses specific qualifications of each individual, while the latter addresses systematic exclusion of an entire group.

> The blunt constraint that no deaf person can be qualified to sit as a juror is a passe conclusion which defies and has no connection with reality or common sense. The law is a reflection of life and its realities and as Holmes taught us "[t]he life of the law has not been logic; it has been experience." (footnote omitted). It is imperative that we here recognize the crucial role which uninformed and irrational thinking has played in the perpetuation of this misapprehension about the deaf and reject such thinking. No longer can we lump all deaf persons together and discard them in a faceless silent heap, as in the past, on the assumption that they are all the same--inept and unable to fulfill this requirement of citizenship.

Guzman, 478 N.Y.S.2d at 460.

The same is true of the blind and disabled. "[People] shout at . . . blind [people] as if they are deaf and try to lift them, as if they are orthopedically disabled;" "They speak to persons with physical disabilities as if they were children." *See* "The Long and Sorry History of Discrimination Against People with Disabilities in the United States – and its likely causes," *The Ragged Edge* OnLine, (Sept/Oct 2000), http://www.ragged-edge-mag.com/garrett/causes.htm.

Turning to the factors used by the Ninth Circuit to identify a distinctive group there can be no doubt that the group of "blind and disabled" persons is limited by an objective factor. Indeed, the State concedes as much (Resp.Br.26). According to the State, the "blind and disabled" do not comprise a distinct group because they are not

homogenous (Resp.Br.26-27). The State's mistake is in trying to contort these factors into a litmus test. "[They are] not to be applied mechanically but must be used with common sense in light of the main purpose of the fair cross-section requirement, *viz*. to provide an impartial jury." *United States v. Raszkiewicz*, 169 F.3d 459, 463 (7th Cir. 1999). For example, neither African-Americans, nor women are homogenous – their members come from all ages, occupations and ideologies. They do not share the type of community of interest that the State hopes this Court will require of the "blind and disabled." African-Americans and women comprise a diverse, though distinctive group. *Id.* So do persons who are "blind and disabled"

The State is blinking at reality when it insists that persons who are "blind and disabled" do not share a common experience (Resp.Br. 27). Unfortunately, they have long shared the experience of "[s]econd-class status and deep despair come not from lack of sight but from lack of opportunity, lack of acceptance, lack of equal treatment under the law and (above all) lack of understanding." Kenneth Jernigan, "Blindness: Is the Public Against Us," Address at National Federation of the Blind Convention (Chicago, July 3, 1975), available online at http://www.nfb.org/convent/banque75.htm. Being "historically subject to community prejudices" can identify a group as distinctive. *Raszkiewicz*, 169 F.3d at 463 (citation omitted). Persons who are "blind and disabled" put it this way:

> Our problem is so different from what most people imagine, that it is hard for them even to comprehend its existence. It is not the blindness, nor is it that we have lacked sympathy or goodwill or widespread charity and kindness. We have

had plenty of that—too much, in fact. Rather, it is that we have not (in present day parlance) been perceived as a minority. Yet, that is exactly what we are—a minority, with all that the term implies.

Jernigan, *supra*, http://www.nfb.org/convent/banque75.htm. The job market amplifies this with 70% of blind persons who want to work unable to find a job. Lori Johnston, "High Unemployment Rate among Blind Blamed on Discrimination," Athens EcoLatino, (July 3, 1999), http://www.onlineathens.com/stories/070399/new_0703990013.shtml. "One of the biggest obstacles to blind people finding jobs is employers' attitudes…Many managers think blind people are helpless and can't be effective workers." *Id.* Persons who are blind have a life experience that differs markedly from the rest of society, thus, no other group can aptly represent that interest on a jury. *Cf.* *Guzman, supra* at 467-468 (holding that deaf persons comprise a distinctive group with a unique life experience that must be included in the jury pool).

For all the reasons discussed here and in Appellant's Opening Brief, this Court must reverse Deandra's convictions and sentences and remand for a new trial before a properly selected jury.

II. Jury Selection – Substantial Noncompliance

The trial court erred in overruling Deandra's objections to Henry County's jury selection procedure because the County does not substantially comply with §§494.400-.505, resulting in a jury that does not represent a fair cross-section and violates Deandra's rights to equal protection, due process and freedom from cruel and unusual punishment under U.S. Const., Amends. V, VI, VIII, XIV and Mo. Const., Art. I, §§ 2, 10, 18(a), 21. Henry County's procedure substantially deviates from the statutory mandate:

- **§494.410: Henry County, which has 15,988 residents over age 20, consults DOR's list of 20,009 licensed drivers. Rather than selecting 5% from DOR's list to compile its Master List, Henry County calls DOR's entire list, which contains 25% more people than Henry County has residents, its Master List.**
- **§494.415: Ignoring the statutory mandate to sanitize the Master List, Henry County never deletes disqualified jurors from DOR's list, but only deletes them from a list of 500 names randomly drawn from DOR's list.**
- **§494.430: Henry County randomly selects 500 names from DOR's list and sends each person a juror qualification form. Judge Roberts lets clerks use "their sound judgment" to excuse obviously sick or injured jurors. Clerks also excuse jurors they know to be on vacation.**

These systemic deviations from the statutory mandate do not yield a fair cross section of Henry County since they exclude all "blind and disabled" persons. These violations prejudiced Deandra in that they skew the population of potential jurors

such that, here, nearly four out of five people drawn from the Master List provided by DOR proved to be unqualified to sit as jurors in Henry County.

This issue raises two questions: what did the legislature intend when it created the procedure for selecting juries and does Henry County's procedure promote that purpose. The simple answer must be that the Legislature intended to produce a jury pool that represented a fair cross-section of the community. *See* *State v. Gresham*, 637 S.W.2d 20, 24 (Mo.banc 1982). Henry County's procedure does not do this.

The State is correct about one thing – case like *State v. Bynum*, 680 S.W.2d 156 (Mo.banc 1984) and *State v. Albrecht*, 817 S.W.2d 619 (Mo.App., S.D. 1991) have endorsed very similar procedures (Resp.Br. 34-35). These cases have let counties use the entire public record as their master jury list. *Bynum, supra* at 160 (21,000+ registered voters) and *Albrecht, supra* at 623 (12,000 licensed drivers). These cases follow from faulty logic and should no longer be followed. They assume that by starting with the entire target population of potential jurors and proceeding with random selection, the counties ensure a fair cross-section of their communities. This simply is not true. While the public record, itself, may represent a fair cross-section, random selection does not insure that that fair cross-section will carry-over to the qualified list.

Random selection simply ensures that each person in the target population has an equal chance of being selected each time. Warren, "Samples and Populations at page 12," Sociology 220, University of Washington-Seattle (May 16, 2002), available online at http://www.soc.washington.edu/users/jrwarren/soc220/Week7-2.pdf. When the goal is to produce a representative sample, i.e., one that looks like the target population, it is the

size of the sampling and not the randomness of the selection that matters. *Id.* at page 11. For example, when flipping a coin ten times, we might reasonably expect to get five heads, but with each flip of the coin, we have an equal chance of getting heads or tails. This creates the random chance of getting anywhere from zero to ten heads rather than the expected five. *Id.* at 3. In preparing this reply brief, counsel visited Ken White's Coin Flipping Page[3] and tossed a penny ten times, getting 8 heads and 2 tails. Repeating this process 50 times, however, will yield a representative distribution – i.e., one that closely resembles a bell curve. "Samples and Populations" at page 4.

Drawing just 500 names from a list of 20,000 names is akin to tossing a coin just 10 times. In this case, this small sampling yielded 396 disqualified jurors and only 104 qualified jurors (roughly 8 heads and 2 tails). It cannot seriously be debated that this sample is representative of Henry County. Whether this procedure has been endorsed by *Bynum, supra* and *Albrecht, supra*, it is not what the Legislature intended.

The Legislature recognized the critical importance of an adequate sample population. Had the Legislature intended for the qualified list to be drawn directly from the public record, it would have said so. It didn't. Instead, it directed the boards of jury commissioners to consult the public record and use random selection to compile a master list that comprised ***not less than five percent of the county's total population***. §494.410. In Henry County, this requires a list of ***not less than*** 1,100 names (Tr. 372). *Bynum, supra* and *Albrecht, supra* cannot judicially redact this sampling requirement.

[3] *See* http://shazam.econ.ubc.ca/flip/

For all the reasons discussed in Appellant's Opening Brief and this reply brief, Henry County's violations of the statutorily mandated procedures are fundamental and systemic. They appear at every step of the process and substantially impair the County's ability to select a fair cross-section of its community. This Court must reverse Deandra's convictions and sentences and remand for a new trial before a properly selected jury.

III. Stacking the Deck: Striking Juror Tucker

The trial court abused its discretion in overruling Deandra's objection and striking Juror Tucker for cause because that ruling deprived Deandra of his rights to due process, a fair and impartial jury and to be free from cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII and XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. The State agreed that it had been "[e]stablished" that Juror Tucker believed that the death penalty is appropriate in some cases. Juror Tucker unequivocally stated that she could consider and recommend the death penalty and that she would follow the court's instructions. She simply did not want to serve as foreperson and sign the verdict. Since there is no legal requirement that any juror accept the role of foreperson, Juror Tucker's desire not to be foreperson did not prevent or substantially impair her from abiding by her oath and the court's instructions.

The State complains that having to seat Juror Tucker would have forced the trial court to gamble that she would not be selected to be foreperson (Resp.Br. 43). This diversionary tactic assumes that selecting a foreperson is like playing Russian Roulette. It's not. The State never explains how Juror Tucker would ever be placed in the position of having to be foreperson. There is absolutely no law, instruction or oath requiring *any* juror to serve as foreperson against their will. *State v. Kreutzer*, 928 S.W.2d 854, 866 (Mo.banc 1996); *accord Alderman v. Austin*, 663 F.2d 558, 563 (5th Cir. 1981) ("[W]e reject the State's suggestion that service as foreman is among every juror's duties. Moreover, we know of no Georgia law requiring any juror to serve, against his will, as

foreman of the jury in any case."), *affirmed* *Alderman v. Austin*, 695 F.2d 124, 126 (5th Cir. 1983) (en banc).

Of course, this realization does not dissuade the State. It simply ponders: But what if all twelve jurors held beliefs like Juror Tucker and no one would accept the role of foreperson (Resp.Br.43, *citing* *State v. Smith*, 32 S.W.3d 532, 545 (Mo.banc 2000)). This is a *reduction ad absurdum* argument. It is a doomsday scenario that simply will not occur in reality.

This Court cannot condone Tucker's disqualification. *Witherspoon v. Illinois*, 391 U.S.510 (1968) addresses the constitutional right to an impartial jury. *Wainwright v. Witt*, 469 U.S. 412, 416 (1985). Thus, the structural error caused by her disqualification cannot be discarded as harmless. *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). This Court must reverse Deandra's death sentences and remand for a new penalty phase trial.

VIII. *Ring v. Arizona*: Sentenced by Court

The trial court erred in sentencing Deandra to death because adhering to the dictates of §565.030.4(4) violated Deandra's rights to due process and a jury trial and subjected him to cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII and XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. First-degree murder is punished by imprisonment for life without parole *unless* a jury finds all essential facts necessary to impose death, i.e., that (a) at least one statutory aggravator exists for each murder, (b) the "facts and circumstances in aggravation…, taken as a whole" warrant death, and (c) the "facts and circumstances in mitigation" do not outweigh the "facts and circumstances in aggravation." Deandra's jury could not decide punishment, and rather than polling the jury to determine whether it had made these three factual findings, the trial court, pursuant to §565.030.4(4), began the deliberative process anew, made the three essential factual findings, *sua sponte*, and sentenced Deandra to death. Since this sentencing procedure is unconstitutional, §565.040.2 requires this Court to order Deandra be sentenced to life without parole.

The State correctly describes the capital sentencing procedure as presenting two questions: Which defendants ***can*** receive the death penalty (i.e., who is eligible for it) and which defendants ***should*** receive it (i.e., who will be selected for it) (Resp.Br. 64) (citation omitted). The first question serves to "narrow the class of murderers subject to capital punishment." *Gregg v. Georgia*, 428 U.S. 153, 196 (1976). It must be answered by the jury. *Ring v. Arizona*, 536 U.S. 584 (2002); *Woldt v. Colorado*, 64 P.3d 256, 266

(Colo. 2003). A court may not decide which defendant is eligible for the death penalty, only which eligible defendant will actually be selected for it. *Ring, supra*.

Respondent opines that the only eligibility inquiry is whether there are statutory aggravating circumstances (Resp.Br. 68-70). This vastly oversimplifies Missouri's procedure and ignores the narrowing inquiry. Missouri presents its trier with four questions, and as the following chart illustrates, only the fourth question addresses who **should** be sentenced to death. Each of the first three questions serves to narrow the class of defendants subject to the death penalty:

ELIGIBILITY: Can you sentence the Defendant to death?
1. Is there at least one statutory aggravator? If **not,** then you **cannot** impose death. §565.030.4(1); MAI-CR3d 313.40
2. Do the aggravator(s) warrant death? If **not,** then you **cannot** impose death. §565.030.4(2); MAI-CR3d 313.41A
3. Do the aggravators outweigh the mitigators? If **not,** then you **cannot** impose death. §565.030.4(3); MAI-CR3d 313.44A
SELECTION: Should the defendant get death?
4. Is death appropriate in this case? §565.030.4(4); MAI-CR3d 313.46A

The State asks this Court to contort the second and third questions into "sentencing factors" that address whether the defendant ***should*** be sentenced to death (Resp.Br. 69-70). But such a warped reading of §565.030.4 would render that statute obsolete. Notably, the State makes no effort to distinguish these two factual inquiries from the "materiality" inquiry at issue in *United States v. Gaudin*, 515 U.S. 506 (1995) and discussed in detail in Appellant's Opening Brief (App.Br. 86). In crafting questions 2 and 3, the Legislature sought to fulfill its constitutional duty to narrow the class of murderers subject to Missouri's ultimate penalty. If the trier answers **no** to **any** of the first three questions, the defendant **cannot be** sentenced to death. §565.030.4(1-3). No matter how respondent labels the second and third question, their answers reveal which defendants are eligible for death, not which defendants should receive death. *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002) (whether there are mitigating factors that outweigh the aggravating factors is a factual inquiry that reveals who is eligible for death and not merely a discretionary weighing that answers who should receive death).

Colorado has a very similar four-step inquiry for its trier. *Woldt, supra* at 264-265. In the first three steps, Colorado seeks to narrow the class of murderers subject to death. *Id.* It requires the trier to find the existence of at least one statutory aggravator, consider the presence of mitigating factors and decide whether the aggravating factors outweigh the mitigating factors. *Id.* Each of these three steps address whether the defendant **can be** sentenced to death. *Id.* Only the fourth step provides the discretion to answer whether an eligible defendant **should** receive the death penalty. *Id.* at 265. Because the judge and not the jury found that Woldt was eligible for death, his death

sentence was reversed. *Id.* at 267. Pointing to Colorado's statutory provision that any defendant whose death sentence is held to be unconstitutional shall be resentenced to life imprisonment without parole, the Colorado Supreme Court ordered the trial court to resentence Woldt to life without parole. *Id.* at 267, 272.

Missouri has an identical statute. §565.040.1-2. And Deandra's death sentences are unconstitutional for the same reason that Woldt's was unconstitutional. This Court should reverse Deandra's death sentences and order the trial court to resentence him to life imprisonment without parole.

Of course, the State tries to salvage its death sentences by asking this Court to infer that the jury made the necessary findings (Resp.Br. 70-76). Such an effort to win at any cost cannot be condoned. *Berger v. United States*, 295 U.S. 78, 88 (1935). The State stridently protests that the jury is presumed to have followed the instructions and that, by returning the verdict it did, the jury inferentially found the necessary sentencing elements (Resp.Br. 70-72) (citations omitted). First, whether this is true or not is irrelevant. Respondent ignores that, once the jury announces its inability to decide punishment, §565.030.4(4) voids the jury's deliberations and orders the trial court to begin anew. Section 565.030.4(4) does not direct the trial court to accept the jury's eligibility findings and simply answer whether this defendant **should** receive death. It mandates that the trial court itself decide whether the defendant is eligible. Id. The trial court sentenced Deandra to death based upon **its** findings that he was eligible for that punishment!

Secondly, there is simply no verdict, nor any polling to evidence any finding by the jury that would make Deandra eligible for the death penalty. Noting a similar

absence, the Nevada Supreme Court recently reversed a death sentence. *Johnson, supra* at 462. Appellant is aware of no other criminal verdict that can be inferred. Death, to be sure, is different. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). That difference, however, is aimed at increasing reliability, not reducing it. *Id.*

Conclusion

This trial did not produce a fair ascertainment of the truth, thus Deandra M. Buchanan respectfully requests the following relief:

New Trial:	Points I, II, V
New Penalty-Phase:	Points III, VI, VII, IX
LWOP:	Point VIII; Proportionality

Respectfully Submitted,

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Certificate of Compliance and Service

I, Gary E. Brotherton, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office2002, in Times New Roman size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains _____ words, which does not exceed the **7,750** words (25% of 31,000) allowed for a reply brief.
- ✓ The floppy disks filed with this brief contains a copy of this brief. The CompactDiscs filed with this brief contain a complete copy of this brief, its appendix, the trial transcript, as well as complete copies of each authority cited herein. The floppy disks and CDs have been scanned for viruses using a McAfee VirusScan program, which is updated each Sunday. According to that program, the disks are virus-free.
- ✓ A true and correct copy of the attached brief and a floppy disk containing a copy thereof were mailed, first class, postage prepaid on the **28th** day of **May 2003**, to John M. Morris, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Gary E. Brotherton